Supreme Court, U.S.
FILED
DEC 26 2001
OFFICE OF THE CLERK

No. 01-975

In The

Supreme Court of the United States

KARLA GARZA,

Petitioner,

vs.

PRESTIGE FORD GARLAND, LIMITED PARTNERSHIP, doing business as PRESTIGE FORD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN E. WALL, JR.
Counsel of Record
LAURA EARDLEY CALHOUN
LAW OFFICES OF JOHN E. WALL, JR.
5728 Prospect Avenue, Suite 2001
Dallas, Texas 75206
(214) 887-0100 (*telephone*)
(214) 887-0173 (*facsimile*)

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

86 A P

QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for an appellate court to substitute its opinion for that of the ultimate factfinder and conclude on its own volition that inconsistent and conflicting testimony by the movant-employer's representatives "show[s] only that their memories in retrospect differ", when an equally plausible conclusion could be drawn, i.e., that one or all of the employer's witnesses were not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have proven to be unworthy of belief even in the view of the trial court?

3. In a Rule 56 summary judgment proceeding involving an employment discrimination case, is it error to require the nonmovant-employee to present *corroborating evidence* of her affidavit evidence (if it is otherwise competent summary judgment evidence) to defeat summary judgment, or is affidavit evidence alone sufficient when it controverts the movant-employer's stated reason for the adverse employment action or otherwise demonstrates discrimination, particularly when the employer's affiants are guilty of mendacity?

4. Does the Fifth Circuit's opinion in *Garza*, which requires corroborating evidence from the nonmovant-employee and which resolves credibility questions on material facts in favor of the movant-employer, improperly place a heightened burden on

QUESTIONS PRESENTED – continued

the nonmovant in a Rule 56 summary judgment proceeding.?

5. Does the Fifth Circuit's opinion in *Garza* metamorphasize Rule 56 to the extent that all of the nonmovant-employee's controverting evidence will be rejected, unless corroborated, and considered in the light most favorable to the movant-employer in an employment discrimination case?

6. Does the Fifth Circuit's opinion in *Garza* violate the Seventh Amendment?

7. Does the Fifth Circuit's opinion in *Garza* ignore this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (which requires that facts asserted by a nonmovant in a summary judgment proceeding be substantiated by evidence, rather than pleadings) by requiring the nonmovant to submit additional evidence corroborating the existing affidavit testimony before the affidavit testimony may defeat a Rule 56 summary judgment motion?

8. Does the Fifth Circuit's opinion in *Garza*, which requires corroborating evidence of discrimination from an unknown source, other than the nonmovant-employee, to defeat summary judgment and which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as mere memory lapses), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which (1) clearly places credibility determinations within the province of the factfinder; (2) permits the factfinder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

QUESTIONS PRESENTED – continued

9. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives parties of the ability to accurately consider the merits of liability?

10. Does the Fifth Circuit's opinion in *Garza*, which requires corroborating evidence of discrimination from the nonmovant-employee and holds that the affidavit testimony of the nonmovant-employee is insufficient alone to defeat summary judgment create significant uncertainty as to the nonmovant's burden in a summary judgment proceeding, particularly in light of its deviation from Fifth Circuit precedent and the opinions of other circuit courts, including the First, Third, Fourth, Ninth and Tenth Circuits, which recognize and follow this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)?

11. Can false affidavit evidence on liability issues submitted by the employer be considered as evidence supporting an employee's proof of pretext in an employment discrimination claim when the testimony was stricken by the trial court pursuant to valid objection due to its proven mendacity?

12. Does the Fifth Circuit's opinion in *Garza* improperly require an employee claiming discrimination in a summary judgment proceeding to waive an otherwise valid objection to a false affidavit submitted by an employer, when the employee, if given a trial, could use the false statements to impune the employers veracity?

QUESTIONS PRESENTED – continued

13. Does the Fifth Circuit's novel election theory, set forth in *Garza*, improperly and irrevocably prejudice employees faced with false affidavit evidence submitted by the employer in a Rule 56 proceeding?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States Court of Appeals for the Fifth Circuit:

1. Karla Garza, Appellant-Petitioner
2. John E. Wall, Jr., Attorney for Appellant-Petitioner
3. Prestige Ford Garland Limited Partnership, doing business as Prestige Ford, Appellee-Respondent
4. Jennifer S. Stoddard, James D. Blume and the law firm of Blume & Stoddard, Attorneys for Appellee-Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES 2

STATEMENT OF THE CASE 4

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT 9

CONCLUSION 25

APPENDIX A (9/26/01 Opinion of the Fifth Circuit Court of Appeals) ..... App. 1

APPENDIX B (2/16/01 Judgment of the District Court) ..... App. 12

APPENDIX C (2/16/01 Order of the District Court granting summary judgment) ..... App. 13

APPENDIX D (Excerpts from transcript of 2/16/01 summary judgment hearing) ..... App. 14

APPENDIX E (2/6/01 Order on summary judgment objections) ..... App. 22

APPENDIX F (1/31/01 Order on summary judgment objections) ..... App. 24

TABLE OF CONTENTS – Continued

Page

APPENDIX G (Affidavit of Karla Garza – without attachments).....App. 28

APPENDIX H (Affidavit of Charlie Nixon – without attachments).....App. 37

APPENDIX I (Excerpts from oral deposition of Charles Nixon).....App. 41

TABLE OF AUTHORITIES

Page

CASES

Abramson v. William Patterson College of New Jersey, 260 F.3d 265 (3rd Cir. 2001) 10

Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2001) 10

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 19, 20, 21, 25

Chuang v. Univ. of Cal. Davis, 225 F.3d 1115 (9th Cir. 2000) 10

EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000) 10

Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 2000) 10

Fierros v. Texas Department of Health, ___ F.3d ___, (2001 WL 1484868) (5th Cir. 2001) 10, 20

Murrell v. Ocean Mecca Motel, Inc., 262 F.3d 253 (4th Cir. 2001) 10

Okere v. Bill J. Priest Institute for Economic Development, 2001 WL 1297654 (N.D. Tex. 2001) 18, 21

Ratliff v. City of Gainesville, Texas, 256 F.3d 355 (5th Cir. 2001) 10

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) .....*passim*

Rivera-Rodriguez v. Frito Lay Snacks Carribean, 265 F.3d 15 (1st Cir. 2001) 10

Russell v. McKinney Hospital Venture, 235 F.3d 219 (5th Cir. 2000) 10

TABLE OF AUTHORITIES – Continued

Page

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) 10, 11

Vance v. Union Planters Corp., 209 F.3d 438 (5th Cir. 2000) 20

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fed. R. Civ. Evid. 801(d)(2) 12

Fed. R. Civ. P. 56 ..... 2, 9, 19, 20, 23, 25

Fifth Circuit Local Rule 47.5.4 18

JURISDICTIONAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1343(4) 4

28 U.S.C. § 2101(c) 1

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

42 U.S.C. § 2000e-2 .....3, 4

42 U.S.C. § 2000e-3 .....3, 4

U.S.C.A. Const. Amend. VII (West 1987) 3, 26

SECONDARY SOURCES

Pattern Jury Instructions, Fifth Circuit (Civil Cases), Section 3.1 (West 2001) 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in case no. 01-10382 affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent. The Fifth Circuit's September 26, 2001 opinion is printed here as Appendix A. The district court's February 16, 2001 order and final judgment are printed here as Appendix B and Appendix C, respectively. Relevant excerpts from the transcript of the trial court's February 16, 2001 hearing on the summary judgment motion are printed here as Appendix D. The district court's orders on objections to the summary judgment evidence are printed here at Appendix E and Appendix F.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on September 26, 2001.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

1. The rules applicable to this case are as follows:

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

. . . .

(c) Motion and Proceedings Thereon. . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so

respond, summary judgment, if appropriate, shall be entered against the adverse party.

2. The constitutional provision applicable to this case is as follows:

Constitution of the United States

Amendment VII – Civil Trials

In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. . . . U.S.C.A. Const. Amend. VII (West 1987).

3. The statues applicable to this case are as follows:

Title VII of the Civil Rights Act of 1964, as amended

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an

employment agency, or joint labor management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Petitioner, Karla Garza ("Garza") brought suit against her former employer, Respondent, Prestige Ford Garland, Limited Partnership, doing business as Prestige Ford ("Prestige"), pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 and § 2000e-3 (sex discrimination and retaliation). Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4).

Facts Material to Consideration of the Questions Presented:

Garza was employed as a commissioned sales person by Prestige for eight (8) working days beginning April 22, 1999 and ending May 7, 1999. In her application and during the pre-employment interview, Garza disclosed that she did not have any experience selling cars. Garza was nevertheless hired and received no training. Garza was told by the Prestige Manager who hired her, Parrish

Vasipour, that the best way to learn was on the job. During Garza's eight days of employment with Prestige, she sold five cars despite her lack of experience.

On or about May 7, 1999, Pablo Villareal, Manager of the International Sales Division at Prestige, asked Garza what she thought about working somewhere else. When Garza asked why, Villareal responded that she could no longer work at Prestige. When Garza pressed for an explanation, Villareal stated that "brothers could not work together". (Karla Garza's brother, Juan Garza, was also employed by Prestige as a sales person at that time). Garza responded that brothers were working together at Prestige, and inquired what the difference was with her situation. As stated in Garza's Affidavit, Villareal informed Garza that she was being terminated because she and Juan were "brother and sister". Garza responded that that was no excuse to fire her. Only then, did Villareal contend that Garza was being fired because she lacked experience. Garza commented that for having no experience, she thought selling five cars in eight days was "pretty good". Garza also informed Villareal that she had disclosed at the time of hire that she did not have experience selling cars. Nevertheless, Villareal terminated Garza. At the time of Garza's termination, her brother remained employed.

Garza next spoke with Mauri Peyton, Used Car Manager at Prestige, about her termination. Peyton informed her that she could only remain at Prestige if she trained in the Used Car Area as a "Liner" for 60 days. Garza asked if she would then be able to sell cars on her own, and he said it would depend. A "Liner" brings customers from the outside to the salesperson, but does not stay inside

and observe or participate in the closing. Taking the Liner position would have been a demotion and a decrease in pay, and Garza declined this position.

After Garza was terminated from Prestige, she obtained another job with a significantly lower volume Ford Dealership. Pablo Villareal claimed that he arranged for and offered this job to Garza; however, Garza disputes this testimony. The Fifth Circuit rejected Garza affidavit testimony and accepted Prestige's version of these events as true, despite the obvious contradictions between the affidavit and deposition testimony. *See* Appendix A at App. 7-9.

Garza sought other employment and, in February 2000, began working as an office assistant to Teresa Fuston, an Allstate Insurance Agent, who handled insurance referrals from Prestige and other car dealerships. During Garza's employment with Fuston, the majority of Fuston's business derived from Prestige, in particular, referrals from the International Division managed by Pablo Villareal and Felix Gutierriez.

Prior to working for Fuston, Garza had filed a charge of sex discrimination with the Equal Employment Opportunity Commission against Prestige about her termination. Shortly after hiring Garza, Fuston asked Garza if she was suing Prestige. Garza replied that she did not want to discuss it over the phone, but later confirmed that she had filed a sex discrimination claim against Prestige. Fuston and Garza then discussed a different phone call which Fuston had received from Juan Carlos Olvera, a Prestige salesman. In this conversation with Fuston

(which Garza recorded),[1] Fuston confirmed that Olvera had claimed that Garza was a troublemaker, was suing Prestige, and that a group of them at Prestige did not desire to work with Garza.

Fuston later claimed in her deposition that Olvera was not representing Prestige, just "himself and other salespeople there that did not like Karla.". However, Fuston also admitted in her deposition that Olvera stated that in addition to himself, Felix Gutierrez (a Manager at Prestige) and several sales people did not care to deal with Garza.[2]

Fuston claimed that she was not going to fire Garza, but did forbid Garza from interacting with Prestige. To conceal her employment from Prestige, Garza utilized an alias while working in Fuston's employ. Also, Garza was not placed on the company payroll, and was instead paid with a personal check by Fuston.

In April 2000, Garza was subjected to harassment and humiliation from Fuston. For instance, in addition to having to use an alias, Fuston did not train Garza and would often leave her alone in the office. On Garza's last day of work, Fuston yelled and cursed at Garza for not providing insurance quotes to some walk-in potential

---

[1] Fuston later in a deposition verified that her voice was on the tape recording and that her statements made on the recording were truthful.

[2] In holding that Garza presented no evidence "whatsoever" that Olvera acted on behalf of Prestige, the Fifth Circuit ignored this non-hearsay *deposition testimony from Fuston* regarding an admission of a party opponent. *See* Appendix A at App. 10.

customers. Garza was not licensed to sell insurance or provide insurance quotes, but Fuston nevertheless, berated Garza. Fuston's treatment of Garza was so harsh that it reduced Garza to tears, and she suffered a nose bleed, was spitting blood and experiencing breathing difficulty. Because Garza was physically ill and could not tolerate the treatment that she received from Fuston and the constant pressure of having to conceal her employment with Fuston from Prestige, Garza resigned.

Not surprisingly, Prestige did not admit that Garza was terminated on account of her sex nor did it admit to retaliating against Garza. The evidence, however, from Prestige regarding the reason for the termination and the events preceding and following the termination was in substantial self-conflict and in conflict with Garza's testimony. Nonetheless, in an Opinion filed September 26, 2001 the Fifth Circuit affirmed summary judgment in favor of Prestige. *See* Appendix A at App. 1-11. The Fifth Circuit wrote that, aside from Garza's affidavit testimony, there was no other evidence supporting a finding of pretext. *Id.* at App. 7. The Fifth Circuit supplanted the role of the jury and resolved the self-conflicting and inconsistent evidence from Prestige in favor of Prestige. *Id.* at App. 7-9.

Most charitably characterized, equal inferences of either discrimination or no discrimination could have been drawn from the evidence. Nevertheless, the Fifth Circuit affirmed summary judgment further obscuring the role of the trial court in a summary judgment proceeding. *See* Appendix A at App. 1-11. The opinion also heightened the burden a nonmovant must bear to survive

summary judgment in an employment discrimination case. *Id.*

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. **The Fifth Circuit's opinion so metamorphasizes the burdens in a summary judgment setting involving alleged employment discrimination that the significance of *stare decisis* vanishes. The opinion ignores this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) regarding the quantum of proof required in an employment discrimination case. The opinion further contorts Fed. R. Civ. P. 56 to the point that all of the evidence is considered in the light most favorable to the movant and credibility questions are unilaterally attributed to memory failure, without considering the possibility that it was not memory failure, but mendacity, not just the suspicion of mendacity. Such deviation from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 and the rules of law mandated by this Court, as well as Fifth Circuit precedent, leaves uncertain the role of the trial court, the viability of *Reeves*, the burden of the nonmovant in a summary judgment proceeding in an employment discrimination case and an employee's ability to properly evaluate the unlawful conduct of the employer; therefore, review by this Court is warranted.**

The Fifth Circuit's opinion in *Garza* is in direct contrast to this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The *Garza* opinion further conflicts with Fifth Circuit precedent, as well as decisions from other circuit

courts, including the First, Third, Fourth, Ninth and Tenth Circuits, which ostensibly follow *Reeves* on the quantum of proof required in a summary judgment proceeding involving an employment discrimination case. *See, e.g., Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223 (5th Cir. 2000); *Evans v. City of Bishop*, 238 F.3d 586, 590 (5th Cir. 2000); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Ratliff v. City of Gainesville, Texas*, 256 F.3d 355 (5th Cir. 2001); *Fierros v. Texas Department of Health*, ___ F.3d ___ (5th Cir. 2001) (2001 WL 1484868); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253 (4th Cir. 2001); *Rivera-Rodriguez v. Frito Lay Snacks Carribean*, 265 F.3d 15 (1st Cir. 2001); and *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001).

As followed by other circuit's, and as this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. This Court previously reasoned that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Further, "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate

fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*." (emphasis in original) *St. Mary's*, 509 U.S. at 511, 113 S.Ct. at 2747-50; *see also Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108. This Court made it clear that proof of the falsity of the employer's stated reason for the adverse employment action is a form of circumstantial evidence that is probative of intentional discrimination. *Reeves*, 530 U.S. at 147; 120 S.Ct. at 2108, *citing St. Mary's*, 509 U.S. at 517, 113 S.Ct. 2742.

In reiterating the *St. Mary's* standard, this Court in *Reeves* recognized that there may be some instances where no rational factfinder could conclude that discrimination occurred even when a *prima facie* case has been established and there is sufficient evidence to reject the stated explanation. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. For instance: (1) if the record revealed as a matter of law some nondiscriminatory reason for the decision; or (2) if the employee created only a weak issue of fact as to the falsity of the employer's explanation and there was "abundant and uncontroverted independent evidence" that no discrimination occurred. *Id.*

Such inadequacies were not present in *Garza*. Nonetheless, in contrast to clear precedent, the Fifth Circuit affirmed summary judgment, rejecting Garza's sex discrimination and retaliation claims in favor of the employer's story, ignoring Garza's evidence of the falsity of the stated reason for termination and resolving the obvious credibility questions in favor of the movant-employer. *See* Appendix A. Garza stated in her affidavit that the stated reason for the termination was gender-

based.[3] *See* Appendix G at App. 30. As Garza explained in her affidavit, it was only after she challenged the "because you are brother and sister" reason as not being a legitimate reason to terminate her, that Villareal suddenly claimed that Garza was being terminated for "lack of experience". *Id.* A jury could have easily inferred that the sudden excuse of "lack of experience" was a pretextual reason for the termination and was only asserted as a recent fabrication when Garza identified the clear discrimination. This after-the-fact "reason" was also directly belied by the evidence that Prestige hired Garza just eight days earlier knowing that Garza possessed no experience. *Id.* at App. 28-29. Prestige also admitted to providing no training to Garza. *Id.* Further, despite the inexperience, Garza sold five cars in the eight days she was employed. *Id.* at App. 30. Also Prestige's claims that Olvera was not acting as an agent of Prestige when contacting Fuston about Garza were refuted by Fuston's testimony that Olvera was calling for himself and other sales people, including Manager Felix Gutierrez, who did not like or want to work with Garza.

If that were not enough, Prestige's testimony conflicted at almost every stage of the termination process, including the stated reason. The evidence of the falsity of the stated reason and Prestige's lack of credibility clearly should have precluded summary judgment. Instead, the

---

[3] The statements, as set forth in Garza's affidavit, which were made by Manager Pablo Villareal during Garza's termination meeting were an admission of a party opponent and were not hearsay. Fed. R. Civ. Evid. 801(d)(2). As such, these statements should have been considered by the Court as direct evidence of discrimination.

Fifth Circuit resolved the credibility issues in favor of Prestige, somehow finding it appropriate to conclude that the inconsistencies were merely memory lapses (although no such explanation was fostered by Prestige). Some of Prestige's credibility problems regarding material issues in this case included:

✓ In answers to Interrogatories, Prestige claimed that Pablo Villareal, Garza's supervisor, was the sole person making the termination decision. (V3 27-28) In direct contrast, Froylan "Felix" Gutierrez, testified in his deposition that he and Villareal made the termination decision together after a series of discussions and a meeting. (V3 71-79) Also, in contrast, Villareal claimed in his deposition that he did not make the decision with Gutierrez. (V3 54) Villareal claimed he had one phone conversation with Gutierrez about some complaints, and otherwise does not recall meeting with him nor speaking with him about the termination or "much of anything at all". (V3 38, 45, 52, 54-55) Villareal further claimed that he was not Garza's supervisor, despite the repeated assertions to the contrary in interrogatory answers. (V3 26, 27, 37)

✓ Also, contrary to the interrogatory answers which identify Villareal as the sole decision maker, Villareal claimed in his deposition that he made the decision with the Used Car Managers, Cody Love and Parrish Vasipour, after discussions with them (never mentioning Gutierrez). (V3 27-28, 41, 54) Villareal testified that he did not confer with Used Car Manager, Mauri Peyton about the termination or about Garza's experience prior to the termination. (V3 50, 51) Nevertheless, in an "Employment

History" form which Villareal completed about the termination process, Villareal claimed that Garza lacked experience per Mauri Peyton, among others. (V3 62, 68) Also, in this "Employment History" form, Villareal claimed that he discussed "options" with Bill Peace, the Assistant to the President at Prestige. (V3 68, 113) Peace, however, flatly denied discussing any "options" with Villareal. (V3 114)

✓ The interrogatory answers also claimed that Bill Peace "explained to Garza that her lack of experience selling vehicles was the reason for her termination". (V3 26) In contrast to this assertion, Peace stated in his deposition that not only did he not recall discussing the alleged reason for the termination, when asked if had ever heard complaints about Garza, he testified that he had "no idea who Karla Garza is." (V3 113-14, 115) Obviously, Peace never explained anything to Garza.

✓ Villareal testified in his deposition that he never involved General Manager Charlie Nixon in the termination decision. (V3 55-56) Villareal confirmed that he never spoke to Nixon about the termination prior to the termination, and that to his knowledge, Nixon had no interaction with Garza during her employment. (V3 55-56) Likewise, Nixon admitted in his deposition that he had no opportunity to see Garza work, and had no knowledge of her, prior to termination, other than being present at a meeting where she was introduced along with other new sales persons. (Appendix I at App. 41-45; V3 14-15) In contrast, Nixon swore in an affidavit that he had personal knowledge of Garza's performance, lack of experience and reasons for her termination. (Appendix H at App. 37-38) Nixon should receive the opportunity to explain

which of the statements is the truth. These statements are not probative of the mere suspicion of mendacity. Nixon removed the mendacity from suspicion status and demonstrated its active status as clearly as a mosquito crystalized in amber.

✓ Additional proof of the suspicion of mendacity resides in Prestige's interrogatory answers which set forth a litany of reasons (which according to the answer is not even all-inclusive) for Garza's termination, including: lack of experience, difficulty closing sales, requiring assistance from others, not wanting to split commissions, and the fact that Prestige did not provide training to used car sales people and was *unable* to provide training to Garza. (V3 29-30) In stark contrast, the "Employment History" form states only that Garza was terminated for "lack of experience" and references a 90-day probationary period. (V3 68) On the other hand, Gutierrez (who claimed to be a co-decision maker) stated that the only complaint that led to Garza's termination was a claim by some of the salespeople that Garza would not split her commissions when the *men* assisted her with a sale. (V3 71, 74)

✓ In the interrogatory answers, as well as in Villareal's deposition and Nixon's affidavit, there was a claim that training was unavailable for Garza in the Used Car Department. (App. 38; V2 2; V3 29-30, 42-43) In direct contrast, Mauri Peyton testified in deposition that there was training available in the Used Car Department, but that he was not sure what, if any, training Garza received. (V3 102-03)

✓ Also, although *not* mentioned in the interrogatory answers (sworn to by Nixon) among the litany of alleged reasons for Garza's termination, Nixon claimed in his affidavit that Garza caused Prestige to lose sales. (Appendix H at App. 38; V2 1; V3 29-30) As previously pointed out, Nixon admitted in his deposition to having no personal knowledge of Garza's work, performance or the reasons she was terminated. (Appendix I; V3 13-17) Further, although Villareal and Gutierrez claimed in their depositions that Garza was causing Prestige to lose customers, neither could identify a single lost customer. (V3 38, 65, 84-85) (Most likely, this was a Freudian euphemism that with Garza's arrival, the men's sales vanished).

The above examples constitute powerful evidence that the stated reason for termination was false and discriminatory because Prestige's representatives exhibited a complete lack of veracity on the issues most material to this case, i.e., why Garza was allegedly terminated, how and who made the decision. Granting summary judgment was wrong in this case in light of *Reeves* and its progeny. Nevertheless, such authorities were abandoned and the Fifth Circuit instead fashioned its opinion in such a way that such inconsistencies were the result of innocent differences in memory or minor differentiations in language (an inference not suggested by Prestige). This *ab initio* explanation of memory failure absolved Prestige of wrongdoing, even though an equally, more probable, inference that could have been drawn from these inconsistencies was that Prestige's representatives were concealing discrimination and retaliation and could not mold their variant stories into uniformity. Summary judgment should never have been granted in such a case. That it

was leaves in serious doubt the continued viability of *Reeves* in the Fifth Circuit, the role of the courts in evaluating evidence of credibility and the sufficiency of the evidence required to defeat summary judgment in an employment discrimination case.

Upon review of the summary judgment evidence, this case involved a credibility question between Garza and Prestige, and required a sorting of the inconsistencies between each of Prestige's representatives. The outcome of each claim should have depended on which witnesses the jury believed, as opposed to the court. The impropriety of the Fifth Circuit's effort at credibility assessment is only further confirmed by a review of the Civil Pattern Jury Instructions which state in relevant part:

> 1. [Y]ou the jury are the judges of facts.
>
> 2. In determining the weight to give the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time, the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.
>
> 3. [I]f a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood *or* simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an *important* fact or with only an unimportant detail.
>
> 4. The testimony of a single witness may be sufficient to prove any fact, even if a greater

> number of witnesses may have testified to the contrary, if after considering all the other evidence, *you believe that single witness.*

(Emphasis added) *See* Pattern Jury Instructions, Fifth Circuit (Civil Cases), Section 3.1 (West 2001).

The Fifth Circuit usurped what should have been the role of a jury, and in so doing, deprived Garza of her Seventh Amendment Constitutional right to a jury trial. Had the Fifth Circuit abided by *Reeves*, the issue of whether Garza suffered discrimination would have been properly left for the jury to resolve. Instead, after resolving the disputed fact issues in favor of Prestige and rejecting Garza's affidavit testimony as *unsubstantiated*, the Fifth Circuit, in affirming summary judgment, eviscerated *Reeves* (not even citing it for authority) and crafted a new and heightened summary judgment burden for nonmovant-employees in a discrimination case.

The *Garza* standard directly conflicts with *Reeves*. That *Garza* is an unpublished opinion matters not. It is currently cited as authority to perpetuate the newly heightened theory regarding the quantum of proof. *See Okere v. Bill J. Priest Institute for Economic Development*, 2001 WL 1297654 at *3 (N.D. Tex. 2001). *Garza* warrants review because in the current era, unpublished opinions are widely available for review on-line and provide guidance and persuasion (in addition to published opinions) as to rules of law which will be followed. *See* Fifth Circuit Local Rule 47.5.4 (although not generally precedent, an unpublished opinion may be persuasive and may be cited if a copy is provided). A reading of *Garza* demonstrates the denigration of *Reeves* and obscures what is the sufficiency of proof required by an employee-nonmovant to

survive a Rule 56 summary judgment motion. In short, the fundamental purpose of *stare decisis* serves to define the parameters of when one can expect to win and when they cannot. Under *Garza*, this concept has metamorphasized into a moving target.

2. The Fifth Circuit has issued an opinion which improperly contorts the Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) to require that affidavit testimony of the nonmovant-employee in an employment discrimination case be somehow corroborated by additional undescribed evidence before it is sufficient to defeat summary judgment. This requirement of corroborating evidence improperly heightens the burden of the nonmovant-employee in an employment discrimination case and consequently so far departs from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 that review by this Court is warranted.

In addition to chiseling away at the essence of *Reeves*, the *Garza* opinion machinates the Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In *Celotex*, this Court explained that a nonmovant in a summary judgment proceeding, who bears the burden of proof on the issues in question, may not rely on unsupported claims or defenses in the pleadings, but in responding to a motion for summary judgment is required "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*,

477 U.S. at 323-324, 106 S.Ct. at 2553, *quoting* Fed. R. Civ. P. 56(e).

As such, in an employment discrimination case, the affidavit testimony of the nonmovant-employee which sets forth specific facts showing a genuine issue for trial suffices to defeat summary judgment, particularly an affidavit such as Garza's which specified that, per the manager that terminated her, the stated reason for her termination was gender-based. *Id.; see also Vance v. Union Planters Corp.*, 209 F.3d 438, 442 & n.3 (5th Cir. 2000) (even if evidence consists solely of plaintiff's testimony, discrimination may be established); *Fierros v. Texas Department of Health*, ___ F.3d ___ (5th Cir. 2001) (2001 WL 1484868 at *6) (affidavit testimony regarding discriminatory statements made by the employer alone precludes summary judgment and constitutes direct evidence, not merely a "subjective belief").

In contrast, the Fifth Circuit in *Garza*, cited *Celotex* for the notion that "unsubstantiated assertions are not competent summary judgment evidence" and from there saw fit to reject Garza's affidavit testimony of Prestige's discriminatory statement because it was "not borne out in any of the evidence, other than her own affidavit." *See* App. 7. In other words, the Fifth Circuit contorted the well-settled holding of *Celotex* that unsubstantiated assertions in the *pleadings* in a summary judgment proceeding are not competent summary judgment evidence to the point to require that assertions in a nonmovant's *affidavit* must be corroborated to constitute evidence sufficient to establish a fact issue. *See* Appendix A at App. 7.

Such an extrapolation clearly misconstrues the holding of this Court in *Celotex* and places an improper and enigmatically heightened burden on a nonmovant-employee in an employment discrimination case. (After all, just how many affidavits are now necessary, 2 or 20?) As a result, trial courts are left in doubt whether this Court's often-cited *Celotex* opinion somehow supports the Fifth Circuit's proposition in *Garza* that affidavit testimony of the nonmovant-employee alone is insufficient to defeat summary judgment, absent additional corroborating evidence.

Additionally, the *Garza* opinion fails to demonstrate how much and what type of additional corroborating evidence will be required to defeat summary judgment, short of a full confession under oath, in Perry Mason-like fashion, complete with sobbing, weeping, a prayer for forgiveness and a bolt from the witness stand for the back door of the courtroom. The *Garza* opinion converts the muddied waters of the Fifth Circuit opinions to a pit of quick sand for all employees and employers who need the ability to fairly evaluate liability in their case. The tension between the Fifth Circuit and the nonmovant-employee's burden resurrects the disconcerting image depicted in Goya's *Plaeto Inutil!*.

To date, at least one United States District Court has already cited *Celotex* in conjunction with *Garza* for the proposition that unsubstantiated assertions in a nonmovant-employee's affidavit are not sufficient summary judgment evidence in an employment discrimination claim. *See Okere v. Bill J. Priest Institute for Economic Development*, 2001 W.L. 1297654 (N.D. Tex. 2001). Absent review, the Fifth Circuit's flawed interpretation of *Celotex*,

set forth in *Garza*, will no doubt improperly raise the already enigmatic burden of proof.

3. The Fifth Circuit's opinion improperly requires an employee in an employment discrimination case to waive valid objections to false affidavit evidence submitted by an employer in support of summary judgment and suffer the consequences, or object, prove the statements false and thereby lose the ability to show the employer will swear to anything about the material issues. Under the *Garza* opinion, because of a valid objection, clear evidence of pretext and mendacity somehow vaporizes.

Review by this Court is necessary to eliminate the Fifth Circuit's creation of a novel doctrine of election that the employee must make when faced with a false affidavit by an employer regarding the stated reasons for termination, i.e., to either (1) object to the evidence and lose the right to use the false statements as evidence of pretext, or (2) waive the objection and allow the false testimony to support the employer's position and soil the oath of truth.

To illustrate, in *Garza*, Nixon admitted in his deposition that he had no opportunity to see Garza work, and had no knowledge of her prior to her termination other than being present at a meeting where she was introduced along with other new sales persons. *See* Appendix I at App. 41-45. Regardless, Nixon swore in an affidavit that he had personal knowledge of Garza's performance, lack of experience and reasons for her termination. *See* Appendix H at App. 37-38. This affidavit was submitted

by Prestige as summary judgment evidence of the "legitimate non-discriminatory" stated reason for Garza's discharge.

Because these statements in Nixon's affidavit were false by Nixon's own admission in his subsequent deposition, Garza objected to them as being made in bad faith and without personal knowledge of the facts as required by Fed. R. Civ. P. 56(e) and in violation of Rule 56(g). The district court initially struck Nixon's Affidavit in its entirety because of Garza's sustained objections, but on reconsideration, stepped into the role of a single juror and somehow centrifuged truth from falsity and concluded that only the portions of the affidavit pertaining to Nixon's knowledge of Garza and her termination be stricken. (Appendices E and F at App. 22, 24-25). The Fifth Circuit later held that any credibility issue engendered in Nixon's affidavit was resolved by the sustained objection. *See* Appendix A at App. 8. Thus, in the Fifth Circuit's opinion, by reason of the sustained objection, Nixon's lack of candor is completely ignored and consequently cannot support Garza's challenge to Prestige's credibility. *Id.*

That the substance of a false affidavit is stricken by reason of a valid objection should not cause the fact of the falsity to vanish. Following *Garza*, however, an employee in an employment discrimination case who successfully objects to a sham affidavit submitted by the employer (and has the substance of the untrue statements stricken) somehow waives any right to later use the fact of the sham, and the employer's concomitant lack of credibility, as evidence of the falsity of the stated reason for the employer's conduct.

Such a holding essentially condones submission of a false affidavit because, regardless of whether the employee objects or not, the employer stands to benefit. After all, if no objection is made, the false evidence comes in and may be considered. However, if objection is made, the false evidence may be stricken, but the evidence of the affiant's untruthfulness somehow regains the sanctity of the oath previously violated and cannot be used to demonstrate the employer's willingness to say anything to win, the oath notwithstanding. In other words, this is a perverse example of "Hobson's Choice". As occurred in *Garza*, the objection carries a dreadful price: voice it, and if valid, the opponent who offered the sham affidavit can use anything left of the soiled statement which survives objection, while the objector, because of the objection, gets nothing other than a ruling which aides the proffer and manacles the objector by sanitizing the stained oath of the mendacious affiant. The cost of the objection is the loss of the ability to question any of the assertions, although their veracity is, by necessity, in grave doubt.

Moreover, this resulting "free pass" to the employer basically eviscerates *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), because, by making valid objections to the employer's false claims in an affidavit, the employee is, under *Garza*, in actuality asking the court to exclude the very type of "falsity" evidence which following *Reeves* may very well preclude summary judgment. The only other option would be to waive objections, thus allowing the admitted false testimony to be considered and used to defeat the employee's claims. Either choice hamstrings the employee.

In sum, Garza was essentially punished for successfully objecting to Nixon's false affidavit testimony and Prestige was rewarded. As the Fifth Circuit noted, this false testimony by General Manager Nixon constituted the "most important 'credibility issue' " in the case. *See* Appendix A at App. 8. Regardless, this evidence was not considered by the Fifth Circuit because Garza's objected. The untenable election created in *Garza* conflicts with the spirit of Rule 56, the oath of honesty and cannot be reconciled with *Reeves* which provides that one method of proving employment discrimination is to offer, in conjunction with the *prima facie* case, evidence of the falsity of the employer's stated reason for its questioned conduct.

CONCLUSION

The *Garza* opinion exemplifies the need for guidance for courts to follow in determining which claims are appropriate for summary judgment in an employment discrimination case. Far from a fact-specific ruling, the *Garza* opinion is clearly an aberration from the accepted and usual standards in a summary judgment proceeding found in Rule 56. Further, the opinion deviates from this Court's decision in *Reeves*, and leaves uncertain the role of the trial courts in evaluating evidence and making credibility assessments. Left in obscurity is the amount of proof required by the nonmovant-employee to defeat summary judgment and the question of whether *Celotex* requires affidavit testimony to be corroborated before it may be deemed sufficient to defeat summary judgment. In essence, under *Garza*, an employee could be told in a

one-on-one firing that because she is a woman she is being fired, and even if she swears to what was said, which the employer of course denies, without corroborating evidence, the case will be summarily dismissed. Is the Fifth Circuit going to require all employees to tape record their employers? Hopefully not.

The *Garza* opinion also, in applying a novel and misguided election theory, improperly concludes that an employee waives the right to use false affidavit evidence, submitted by the employer, to demonstrate pretext because of a valid objection. The Fifth Circuit also leaves in question the sanctity of the Seventh Amendment.

To resolve these troubling conflicts and questions, review by this Court is warranted.

Respectfully submitted,

JOHN E. WALL, JR.
LAURA EARDLEY CALHOUN
LAW OFFICES OF JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100 *Telephone*
(214) 887-0173 *Facsimile*

Attorneys for Petitioner,
Karla Garza

APENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-10382
Summary Calendar

KARLA GARZA,

Plaintiff – Appellant,

VERSUS

PRESTIGE FORD GARLAND LIMITED PARTNERSHIP, doing business as Prestige Ford,

Defendant – Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:00-CV-400)

(Filed Sept. 26, 2001)

Before JOLLY, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

I. PROCEEDINGS BELOW

Pursuant to a complaint filed with the Equal Employment Opportunity Commission (EEOC), Karla Garza brought a Title VII claim of discrimination on the basis of

---

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sex against her former employer, Prestige Ford. She subsequently added a claim of impermissible retaliation by Prestige Ford in reaction to her lawsuit. Prestige Ford moved for summary judgment under FED. R. CIR. P. 56. Following a hearing on that motion, the trial court granted summary judgment for Prestige Ford. Garza appeals the grant of summary judgment (1) as to her title VII claim of sex discrimination; (2) as to her claim of retaliation; and (3) in light of her claim of serious credibility issues on the part of Prestige Ford's representatives. Garza has also asked whether it would have been error if the trial court had granted summary judgment on the issue of whether she had sustained damages. The opinion of the district court did not address the issue of damages nor base its judgment on any determination of Garza's claim for damages. Therefore, we will not address that issue. The judgment of the district court is AFFIRMED.

II. BACKGROUND

Prestige Ford hired Garza as a used car salesperson although she had no experience in car sales. She did have some experience in retail sales, which led Prestige Ford to give her an opportunity to "sink or swim," although the dealership did not have a formal training program for novices. She contends that she successfully sold five automobiles in eight days between being hired on April 22 and being terminated on or about May 3, 1999. Prestige Ford asserts that Garza was unable to close any of those sales on her own, required the assistance of other salespersons (including her brother, who was also employed by Prestige Ford), objected to splitting her commissions

with those other salespersons after they had assisted her and was generally disruptive to the conduct of business because of her inexperience.

Supervisor Pablo Villareal ultimately told her she would be terminated as a car salesperson. The termination document reflects the reason for her termination as her lack of experience. Mr. Villareal offered Garza an alternative position assisting another salesperson, from which she could gain the necessary skills, but she refused. Garza asserts that Mr. Villareal initially told her that she was being terminated because she could not work at Prestige Ford's place of business while her brother was also employed there. She challenged Villareal's statement on the basis that there were other sets of brothers working at the dealership and claims he then changed his stated reason of termination to Garza's lack of experience. Finally, Prestige Ford arranged a job for Garza with Skyline Ford, a dealership which had a formal training program.

Garza remained with Skyline for four months and resigned in September, 1999. She worked for the Accident and Injury Clinic until December, 1999, when she quit to take a trip to Mexico.

On her return in February, 2000, Garza took a job with Allstate Insurance Company under Agent Teresa Fuston. Ms. Fuston later received a phone call from Juan Carlos Olvera, one of Prestige Ford's employees. Mr. Olvera informed Ms. Fuston of Garza's EEOC complaint and lawsuit. He and other employees regularly referred customers to Ms. Fuston for car insurance. He advised her that neither he nor his co-workers wanted to have

any contact with Garza. Mr. Olvera was not a supervisor nor did he have power to hire, fire or direct other employees. He did not state that he was representing Prestige Ford and Ms. Fuston did not believe that he was acting on the dealership's behalf. Ms. Fuston informed Garza of the phone call and advised her that her employment would not be affected in any way.

Garza asserts that she used a false name in the office to avoid contact with Prestige Ford's employees and was paid by personal check to avoid identifying her with the Allstate office. She agrees that Ms. Fuston treated her no differently after Mr. Olvera's phone call. In March, 2000, Garza and Ms. Fuston argued over how Garza handled certain customers, which resulted in their departure. Garza resigned after that disagreement, although Ms. Fuston asked her to remain. Garza then amended her Title VII complaint, adding a complaint of retaliation by Prestige Ford, based on Mr. Olvera's phone call which Garza claims led to her "constructive discharge" from Allstate.

During the February 16, 2001, hearing on summary judgment, the trial court ruled from the bench that Garza's *prima facie* case, though weak, had been established. The court further ruled that Prestige Ford had offered a legitimate, non-pretextual reason for Garza's termination against which Garza had not presented adequate summary judgment evidence to create an issue of material fact. Also, the court ruled that Garza's departure from Allstate was predicated on her disagreement with Ms. Fuston over the lost customers, which had no causal connection to Mr. Olvera's phone call. Therefore, the trial court held that Garza's resignation was not a constructive

discharge caused by any act of retaliation on the part of Prestige Ford.

III. ANALYSIS

This court conducts a *de novo* review of a grant of summary judgment, ensuring that no genuine issue of material fact exists and that judgment in favor of the appellee was warranted as a matter of law. *See Haynes v. Pennzoil Co.*, 207 F.3d 296, 299 (5th Cir. 2000). Under FED. R. CIV. P. 56(c), summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmovant, reflects no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); *Hall v. Gillman, Inc.*, 81 F.3d 35, 36-37 (5th Cir. 1996).

A.

Under Title VII analysis, (1) a plaintiff must establish a *prima facie* case of discrimination; (2) the defendant may then offer a valid, non-discriminatory reason for the alleged discriminatory action; and, (3) the plaintiff then must show that the defendant's offered reason is merely pretext. *See McDonnell Douglas v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). The Title VII plaintiff bears at all times the "ultimate burden of persuasion." *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993).

A *prima facie* claim is established when a plaintiff shows that she is a member of a protected class under

Title VII; that she was qualified for the position; that she suffered an adverse employment decision; and that the adverse employment decision was differentially applied to her. *See McDonnell Douglas*, 411 U.S. at 802; *Rubenstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 399 (5th Cir. 2000). Here, we determine, as did the trial court, that Garza met the *prima facie* case requirements. Her claim is discrimination on the basis of sex because she is female; she was in fact terminated; and, by her claim of the circumstances, males who were co-employed by Prestige Ford with their siblings were not also terminated. As the district court explained, Garza was not qualified for the specific position, but the fact that Prestige Ford hired her for the position sufficed to show she met the basic qualification for being hired. On that basis, we agree that Garza established her *prima facie* case.

Prestige Ford offers as its reason for terminating Garza's employment that Garza in fact lacked experience required in the position. It hired Garza originally in the expectation that she would be able to pick up the skills needed for car sales on the job, even though Prestige Ford did not offer a formal training program. Instead, Prestige Ford found that her reliance on others to close her sales and her objections to splitting her commission were disruptive. Garza was offered the choice of a lower level job under qualified supervision, from which she could learn the sales skills, or termination. She refused the lower level job. This is a legitimate and non-discriminatory reason for terminating an employee and is consistent with an earlier decision to hire an individual expected to learn on the job.

To prevail at trial, Garza would have to prove that Prestige Ford's offered reason is merely pretext for its actual discriminatory intent. In the summary judgment context, however, Garza is only required to show an issue of material fact regarding pretext. *See Hall v. Gillman, Inc.*, 81 F.3d 35, 37 (5th Cir. 1996). Garza still must present competent summary judgment evidence in doing so. Unsubstantiated assertions are not competent summary judgment evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

In this case, Garza has offered no evidence other than her own assertion by affidavit dated November 1, 2000, that Mr. Villareal told her that she was being terminated because her brother also worked at the Prestige Ford dealership. That assertion has not been borne out in any of the evidence, other than her own affidavit, submitted in this case. Further, her affidavit is founded extensively on hearsay evidence which the trial court properly excluded from consideration. We will do the same. Additionally, the reason for termination Mr. Villareal gave on Garza's Employment History form was "lack of experience," citing the reports of several employees and unit supervisors of Prestige Ford. The remarks entered on the form go on to indicate that Garza was in a ninety day probationary period and that Prestige Ford "got employee new work arrangements at Skyline Ford." This, along with substantiating deposition testimony, is convincing.

Garza cites "serious credibility issues on the part of Defendant's representatives" to bolster her assertion of sex discrimination. She characterizes statements made by

Mr. Villareal and Mr. Gutierrez in deposition, for example, as being so contradictory as to be patently "false." Those statements show only that their memories in retrospect differ as to whether they made the decision to terminate Garza jointly or whether they discussed the matter together and one of them made the actual decision. Another "credibility issue" claimed by Garza takes umbrage with Mr. Villareal's comment on Garza's Employment History form that he had "discussed options" relating to Garza's termination with Bill Peace, Prestige Ford's Special Projects Manager. Garza points out that Mr. Peace stated in deposition that he did not discuss "options" with Mr. Villareal. What he did say, however, was that Mr. Villareal consulted him regarding the impending termination and asked him for input, which Mr. Peace provided. Again, this is little more than a minor differentiation of language or a subtle difference of individual memory.

The most important "credibility issue" Garza points to is in the affidavit of Charlie Nixon, Prestige Ford's General Manager. He asserted "personal knowledge" of the individuals involved and the facts surrounding Garza's termination when, in fact, he based his affidavit on second-hand reports. However, the trial court sustained Garza's objection to Mr. Nixon's affidavit on that point and excluded it from consideration in reaching its summary judgment determination. The court considered only that portion identifying Mr. Nixon as Prestige Ford's custodian of records and authenticating the Employment History form. Again, we have done the same and thus avoid any credibility issue engendered in Mr. Nixon's affidavit.

Garza's claim of Prestige Ford's lack of credibility is thus resolved and casts no issue of material fact of pretext on Prestige Ford's reasons for Garza's termination.

On these bases, Garza's Title VII claim is unsupported and Prestige Ford's legitimate, non-discriminatory reason for terminating her survives Garza's claim of pretext.

B.

A *prima facie* case of retaliation exists if Plaintiff establishes that (1) she participated in statutorily protected activity, (2) she received an adverse employment action and (3) a causal connection exists between the protected activity and the adverse action. *See Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995).

Here, Garza's action in filing an EEOC complaint and lawsuit is obviously protected activity. She claims that she suffered an adverse employment action when Mr. Olvera contacted Ms. Fuston to inform Ms. Fuston of Garza's complaints. Garza characterizes Mr. Olvera as an agent for Prestige Ford and her resignation from Ms. Fuston as a constructive discharge caused by Prestige Ford's retaliatory phone call. Her analysis fails.

Title VII defines "employer" to include "any agent of such a[n employer]." *See* 42 U.S.C. § 2000e(b). Agency in the Title VII context requires that, for an employee's action to be imputed to an employer, the employee must be acting in a managerial capacity and in the scope of employment when committing the wrong. *See Rubinstein, supra*, 218 F.3d at 405. Evidence must support such a

finding. *Id.* Whether an agent is a manager is a fact-intensive inquiry. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999) (en banc). Considerations include a determination of what the individual is authorized to do by the principal; whether the individual has discretion as to what is done and how it is done; and whether the individual has the power to make independent decisions regarding personnel matters or to determine policy. *Id.*

The fact that Mr. Olvera is a salesperson without managerial discretion or authority is uncontested. Garza's agency claim is predicated on her assertion that Mr. Olvera called Ms. Fuston at the behest of one of Prestige Ford's managers, Mr. Felix Gutierrez. On that basis, she asserts that Mr. Olvera acted with Prestige Ford's authorization via its manager, Mr. Gutierrez. Garza claims, in her affidavit, that Ms. Fuston told Garza that Mr. Olvera told Ms. Fuston that he had been asked by Mr. Gutierrez to call and threaten to withhold referrals. Presumably, the trial court disregarded this double hearsay testimony as we do. She offers no other evidence whatsoever that Mr. Olvera acted other than on his own behalf. Ms. Fuston has testified that Mr. Olvera made no such statement to her, that he spoke to her as her friend and that she recognized that he was not representing Prestige Ford in any official capacity.

Under these circumstances, Mr. Olvera was not acting as an agent of Prestige Ford and therefore any statement he may have made to Ms. Fuston cannot be considered as "retaliation."

Finally, Garza quit her employment with Ms. Fuston because of an argument between the two of them relating to the handling of potential insurance customers. There is no evidence, other than Garza's claim, showing any causal connectivity whatsoever between Mr. Olvera's phone call and her decision to quit.

On these bases, Garza's claim of retaliation is meritless.

IV. CONCLUSION.

For the foregoing reasons, the judgment is **AFFIRMED.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA,	*	
Plaintiff,	*	
v.	*	
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP d/b/a PRESTIGE FORD,	*	Civil No. 3:00-CV-0400-H
Defendant.	*	

JUDGMENT

(Filed Feb. 16, 2001)

This Judgment is entered pursuant to the Court's Order dated February 16, 2001.

It is **ORDERED, ADJUDGED** and **DECREED** by the Court that Plaintiff Karla Garza take nothing by her suit against Defendant Prestige Ford Garland Limited Partnership d/b/a Prestige Ford, and this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SIGNED this 16th day of February, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U. S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA,	*	
Plaintiff,	*	
v.	*	
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP d/b/a PRESTIGE FORD,	*	Civil No. 3:00-CV-0400-H
Defendant.	*	

ORDER

(Filed Feb. 16, 2001)

On February 16, 2001, the Court heard argument on Defendant's Motion for Summary Judgment, filed October 2, 2000.

After considering the applicable law, the relevant pleadings and evidence, and the argument of counsel, the Court, for reasons stated from the bench in open court, was of the opinion that Defendant's Motion for Summary Judgment should be, and it was, **GRANTED**.

SO ORDERED.

DATED: February 16, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U. S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA, Plaintiff, VS. PRESTIGE FORD GARLAND LIMITED PARTNERSHIP, d/b/a PRESTIGE FORD, Defendant.	)	CIVIL ACTION NO. 3:00-CV-0400-H (Filed Mar. 20, 2001)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BAREFOOT SANDERS

APPEARANCES:

For the Plaintiff: Mr. John E. Wall, Jr.
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
214-887-0100

For the Defendant: Jennifer Stoddard
BLUM & STODDARD
6116 North Central Expressway
Suite 250
Dallas, Texas 75206
214-373-7788

[2] BE IT REMEMBERED, that on the 16th day of February, 2001, before the HONORABLE BAREFOOT SANDERS, United States District Judge at Dallas, Texas,

the above styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth:

* * *

[32] should say. No Prestige Ford manager testified that the majority of their business goes to Allstate. That wouldn't be true.

Mr. Gutierrez is the only manager who was asked about it, and he said he didn't know. He said he was sure that some went to Allstate. He thought probably if they had the ability to speak Spanish, some Spanish customers would go there, but he had no idea about the volume.

Unless the Court has any additional questions for me, that's all I have.

THE COURT: No. Thank you.

MS. STODDARD: Thank you.

THE COURT: I'll address the matter at this time. I think the essential facts are set forth by defendant's counsel, that is the facts that are material as far at the Court's determination of defending the motion for summary judgment, and I will not restate them at this time.

I'm aware that plaintiff's counsel modified them to some extent, particularly with respect to the reasons for – advanced for her termination at Prestige Ford, but I think that is explained. We have this statement from Ms. Garza that she was told, Well, it was because her brother worked there, and [33] then brother just couldn't handle what in effect was nepotism. But I'd have to point out on

that that the employee separation statement which is in evidence states this she's terminated for lack of experience. And it seems to me that that is much more determinative here.

Now, the claim before us is sex discrimination made by plaintiff and also retaliation which both counsel have covered. The prima facie is established, and Mr. Wall covered that. Let me repeat it. I came out originally from McDonnell Douglas, it's been repeated scores of times. Mayberry, which I referred to, states out pretty much that plaintiff must be a member of a protected class, must be qualified for the job, I think very doubtful here, but the defendant took her. The defendant knew her shortcomings, so I'm not going to say that the prima facie class – prima facie case fails on that basis.

The third prong of the McDonnell Douglas test is that she was terminated. Obviously, that's met. And the fourth prong is what troubles me. And that is the one which I read from Mayberry a while ago. To establish a prima facie case, the plaintiff must show that male employees were treated [34] differently under circumstances nearly identical and cites a number of cases there.

And that case, so far as I know, is still the law in this circuit. I don't find anything here nearly identical and between what plaintiff had and – and circumstances under which she was terminated and how she was treated, nearly identical to any of her male employees. So I think it's highly questionable as to whether the fourth prong is met. But because there is a very low threshold of proof when it comes to establishing a prima facie case, I will pass that by.

The governing authority is here. As you well know, once the plaintiff has established a prima facie case, then it's up to the defendant to articulate a legitimate non-pretextual reason. That's set forth in various places, and I need not go into all the authorities on that, most recently in the Reeves case which governs here. And then after the defendant articulated a legitimate non-pretextual reason, the plaintiff must establish trial by preponderance and a summary judgment must establish a fact issue as to whether or not the reason advanced by the defendant is pretextual. The defendant says, Well, it's because she lacked experience, and it [35] shows. And that is set forth in the employee separation report. That seems to me to be a legitimate, non-pretextual reason.

The question is, is it vitiated at all by the fact that it's joined with this alleged explanation. And the way at least the plaintiff interpreted when – what the separating officer had to say in preparing the employee's separation report and before that, and the plaintiff interprets that as being that she was being discharged for nepotism.

What is clear is that the employee separation report says she was discharged because of her lack of experience, and that stands out to me. So I think that it's established and she had – the defendant established a legitimate, non-pretextual reason.

Now, then we go from there to the question, has plaintiff established a fact issue about this? I don't think so. What she has here is based on her interpretation of Villarreal's remarks at the time of the separation. That's not enough in my judgment at this stage. I understand we have to go on inferences. I understand that the fact

finders would be able to draw inferences, but this seems to me to be stretching inferences much too far. I don't think [36] a fact issue is established by the plaintiff with respect to the defendant's reasoning, and so I don't think the plaintiff has established it's burden of proof.

Let met put it shortly this way: In my judgment, there is no summary judgment evidence which if presented at trial from which a jury could find – reasonably find that the defendant intended to discriminate. I think oftentimes Courts, and I am probably one, that if you look at summary judgment evidence, you have to say, Would this stand up against a directed verdict at the close of plaintiff's – would plaintiff rest? What I've seen so far, in my judgment, it would not. So I'll grant summary judgment on the discrimination claim.

With respect to the retaliation claims that's been set forth, as counsel are aware, in many, many stages and in many places. I refer to one of the most recent ones was Myers versus Dallas Morning News, 209 F.3d – 209 F.3d, 419. The plaintiffs must first establish a prima facie case of retaliation by showing that she engaged in an activity protected by Title VII, that is she filed her complaint; second, that she suffered an adverse employment action; third, that a causal connection exists between the [37] protected actions and the adversary employment action. That is to say in another way, that the defendant's adverse employment action would not have happened but for the desire on the part of the defendant here, maybe I keep transforming these words, the adverse employment action here would not have happened except for the defendant's desire to retaliate. It's a but for case which seems to be somewhat more strict.

Now, the question here is whether or not there's enough to build a retaliation case on. The defendant had pointed out, and I don't think any of this is in disagreement, first the plaintiff went to Skyline Ford. She resigned from there in four months, apparently wasn't making enough money, no fault there. She went to the Accident Injury Clinic from September of '99 to December of '99. Thereafter in February of 2000, she went to Allstate Insurance Company. A few days after she got there, it's alleged and seems not to be controverted that Mr. Olvera, who was an employee of the defendant here, contacted Ms. Fuston who – for whom the plaintiff was working. Mr. Olvera had sent some sales customers over there to obtain insurance. And he said, Well, she's a troublemaker or in effect.

[38] That, of course, does not show agency. And I don't have anything in the summary judgment record that would show agency or anything that – to put it even more generally that would establish authority on the part of Olivers to speak for Prestige Ford in this situation.

Probably at least as important as that, even though it's fuzzed up a little bit later in the record, on March 17th, 2000, plaintiff and Ms. Fuston had a fuss about some potential customer. The detail is not important. Plaintiff became upset. She left the office, and she left Allstate. I can't find anything in that kind of conduct to tie back to Prestige Ford here, particularly when I consider the intervening customers.

I find no evidence that Olvera was acting for the defendant, no summary judgment evidence. I find no summary judgment evidence that there was an adversary

employment action when it seems to me any reasonable interpretation of what went on is that Ms. Garza voluntarily left Allstate. And I find that there's no causal link, therefore, between what happened at the defendant, Prestige Ford, and what happened in the way of the plaintiff's termination.

Stated in her testimony, and it's reflected [39] in the defendant's appendix, that her departure from Allstate had nothing to do with any act or omission by defendant. I understand what Mr. Wall is stating about it, and then and – and an attempt to perhaps make that less clear than it otherwise appears, but it seems to me that when she initially testified, that's what she said, and I don't find any substantial correction in the record about that.

I don't think there's any claim of constructive discharge. Should there be, there's no way that it can be established under the circumstances that here exist.

And again, as with the sex discrimination claim, I don't find anything here from which a reasonable fact finder could determine that there was any retaliation.

So I'll grant summary judgment on both claims and will enter a judgment of dismissal, and I thank you for the presentations.

Court's in recess.

[40] CERTIFICATE

I, DIANE M. DENNIS, Acting Official Court Reporter in and for the United States District Court for the Northern District of Texas, Dallas, Division, certify that during the hearing of the above-entitled and numbered cause, I reported in shorthand the proceedings hereinafter set

forth, and that the foregoing pages contain a full, true and correct transcript of said proceedings.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this, the 13th day of March, 2001.

/s/ Diane M. Dennis, CSR, RPR
DIANE M. DENNIS
Certified Shorthand Reporter
CERTIFICATION NO: 4347
CERTIFICATE EXPIRES: 12-31-01
National Court Reporters
500 S. Ervay, Suite 120-A
Dallas, Texas 75201
214-651-8393

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA, Plaintiff,	*	Civil No. 3:00-CV-0400-H
v.	*	
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP d/b/a PRESTIGE FORD, Defendant.	*	

ORDER

(Filed Febr. 6, 2001)

Before the Court is Defendant's Motion for Reconsideration of Court's February 1, 2001 Order on Nixon Affidavit, filed February 2, 2001.

The Court finds that Paragraph 5 of the Nixon Affidavit, as quoted in paragraph 1.04 of the motion currently before the Court, is competent summary judgment evidence and will be considered by the Court in ruling on Defendant's Motion for Summary Judgment. The Court will also consider the attached Employee Separation Report as authenticated in Paragraph 5 of the Nixon Affidavit.

SO ORDERED.

DATED: February 6, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA, Plaintiff,	*	Civil No. 3:00-CV-0400-H
v.	*	
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP d/b/a PRESTIGE FORD, Defendant.	*	

ORDER

(Filed Jan. 31, 2001)

Before the Court are 1) Defendant Prestige Ford's Rule 56 Motion for Summary Judgment, filed October 2, 2000; 2) Plaintiff's Response to Defendant's Motion for Summary Judgment, filed November 3, 2000; and 3) Defendant's Reply, filed November 17, 2000. Oral argument has been set for 3:00 P.M., Friday, February 16, 2001. *See* Order, filed January 29, 2001.

Each party contests portions of the summary judgment evidence presented by the opposing party. Below, the Court addresses each evidentiary objection.

Plaintiff's Objection

Plaintiff objects to the Affidavit of Charles Nixon and its attachment (Def. App. 1-4). Although Nixon states in his affidavit that the statements contained therein are

based on personal knowledge, Nixon's deposition testimony indicates that he had no personal knowledge of the Plaintiff's termination or of any of the events leading to her termination. (Def. App. 1; Pl. App. 13-17.)

In his deposition, Nixon admits that he only knew Plaintiff because she was introduced when she was first hired. He never observed her work. He never heard any complaints about her prior to her termination. He never spoke to any of her supervisors about her prior to her termination, nor was he involved in making the decision to terminate her. He also testified that he did not know Teresa Fuston at Allstate. (Pl. App. 13-17).

In light of Nixon's admission in his deposition that he had no personal knowledge regarding Plaintiff's termination or the events which are the subject of this case, the Court **SUSTAINS** Plaintiff's objection and **STRIKES** the affidavit of Charles Nixon as summary judgment evidence.

Defendant's Objections

Defendant objects to Plaintiff's use of 1) excerpts from the Oral Depositions of Charles Nixon, 2) Defendant's Objections and Responses to Plaintiff's first Set of Interrogatories, 3) Excerpts from the Oral Deposition of Pablo Villereal, 4) Excerpts from the Oral Deposition of Froylan Gutierrez, 5) Excerpts from the Oral Deposition of Mauri Peyton, 6) Excerpts from the Deposition of William F. Peace, and 7) Excerpts from the Oral Deposition of Teresa Fuston for the reason that this evidence has not been properly authenticated. The Court finds that all

of these documents have been sufficiently authenticated. Defendant's Objection is **OVERRULED.**

Defendant objects to the affidavit of Plaintiff Karla Garza as it is based upon hearsay statements. (Pl. App. 1-13.) The Court agrees with Defendant that hearsay statements are not competent summary judgment evidence. The illustrations presented by Defendant on page four of Defendant's Reply Brief appear to be hearsay. (Def. Reply Br. @ 4.) The Court will not rely on hearsay statements in reaching a summary judgment opinion.

Defendant also objects to those portions of Plaintiff's affidavit that contain her own opinions, self-serving statements and subjective beliefs. (Pl. App. 1-13.) The Court finds that Defendant is confusing sufficiency and competence. While Plaintiff's affidavit may or may not be sufficient to satisfy her burden of proof as respondent to this motion for summary judgment, the evidence adduced is competent summary judgment evidence and therefore Defendant's objection is **OVERRULED.**

The Court similarly **OVERRULES** Defendant's objections to conclusory statements, unsubstantiated assertions and speculations in Plaintiff's affidavit. (Pl. App. 1-13.) The Court finds that Plaintiff's affidavit is competent summary judgment evidence, subject to the hearsay objection sustained above.

Summary

The Court **SUSTAINS** Plaintiff's objection to the affidavit of Charles Nixon and **STRIKES** the use of the affidavit as summary judgment evidence. The Court also **SUSTAINS** Defendant's objection to the use of hearsay

statements in Plaintiff's affidavit and will not rely on these statements in reaching a summary judgment opinion.

All other objections are **OVERRULED.**

SO ORDERED.

DATED: January 31, 2001.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA, *Plaintiff,*	§	**CIVIL ACTION NO. 3-00CV0400-H**
V.	§	
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP d/b/a PRESTIGE FORD *Defendant.*	§	

COUNTY OF DALLAS)
)
STATE OF TEXAS)

AFFIDAVIT OF KARLA GARZA

BEFORE ME, the undersigned authority, on this day personally appeared Karla Garza, who is known to me and, after being duly sworn, deposed as follows:

"My name is Karla Garza. I am over the age of 21 years, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case.

I was employed as a sales person by the Defendant, Prestige Ford, for eight (8) working days from approximately April 22, 1999 until May 7, 1999. At the time I filled out my application to work for Prestige Ford, my brother, Juan Garza,

was employed by Prestige Ford as a sales person. I was interviewed by Parrish Vasipour, in the Used Car area and he hired me to work as a sales person. During my interview, I informed Parrish that I did not have any experience selling cars. I also did not state on my employment application that I had any experience selling cars. (Attached hereto as Exhibit 1 is a true and correct copy of my employment application with Prestige Ford). Parrish informed me that I would learn on the job. I did not receive formal training from Prestige Ford prior to starting my job there but was told by Parrish that the best way to learn was on the job.

As a sales person, I worked on commission. Rather than receiving my full commission on sales that I made, my commissions were split with other salespeople and sometimes with salespeople who did not even work with me on a sale. Because I had no training, I had to request assistance from other salespeople on how to fill out some of the paperwork. My commissions were not evenly split with the employees that helped, on some occasions I was given a smaller portion than the person who helped me. For instance, on one sale I made to Tomas Jiminez, I was given no commission and instead was only paid a $100.00 "referral fee". (Attached hereto as Exhibit 2 is a true and correct copy of the pay stub on this sale.) At no time prior to my termination, did anyone at Prestige Ford tell me that I was disruptive or otherwise not following procedure with regard to sales, commission splitting or any other matter.

During my eight days of employment with Prestige Ford, I sold five cars.

On or about May 5, 1999, I was assisting a customer, Roberto Andrade. Mr. Andrade initially looked at used vehicles, but then selected a truck off of the new car lot that he was interested in buying. Once Andrade selected a vehicle, I then went to Pablo Villareal, the Manager of the International Sales Division, for assistance with the sale. At Villareal's instruction, I informed Andrade that he would need a certain amount for the down payment. After informing Mr. Andrade that he would need a certain amount of money for a down payment, Andrade went to leave.

At this point, Villareal called me one of the offices. The door was open. Villareal asked me what I thought about working somewhere else. I asked him why and he said because I could not work at Prestige Ford anymore. When I asked Villareal why, he told me that it was because brothers could not work together. I told him that other sets of brothers worked there and I asked what the difference was with me. Villareal then stated that it was because Juan and I were brother and sister. I told Villreal that that was no excuse to fire me. Then he claimed that I was being fired because I did not have experience. I then told him that for having no experience, I thought selling 5 cars in 8 days was pretty good. I also told him that I had told them when I was hired that I did not have experience. Villareal did not offer me a job at Skyline Ford or tell me to apply at Skyline Ford. When I walked out of Villareal's office after being terminated, Mr. Andrade was standing outside of Villareal's

office. At hearing that Andrade was not going to buy the truck after he overheard my termination meeting, I told him not to do that. Andrade then left.

I then went to talk with Mauri Peyton, one of the Used Car Managers, about the reason I was terminated. I told Peyton about Villareal's statement that I could not work there because Juan and I were brother and sister. Peyton said he would call Villareal about it. Andrade then returned with his money and I walked him over to Villareal to give him a receipt. After I returned to the Used Car area, Peyton told me that if I wanted to work at Prestige Ford, I would not be allowed in the New Car area. I told him that was fine. Peyton then said that I would have to work as a Liner for another salesperson for 60 days. Peyton said the 60 days would be for training. I asked him if I would be able to sell cars on my own after 60 days and he said it would depend. As a Liner, I would bring customers from the outside to the salesperson. I would not stay inside and observe or participate in the closing. The Liner position was a demotion and a decrease in pay. I would not have been able to sell vehicles on my own as I was hired to do and I would not have been able to observe the closing on the sale. For these reasons, I declined to work as a Liner.

During my employment, there were other sets of brothers employed at Prestige Ford. At the time of my termination, my brother, Juan Garza, was not terminated.

Approximately a week after my termination, I went to Prestige Ford and spoke with Charlie Nixon, the General Manager, and Nixon said

that he did not know that I had been fired, but that he would see that I was paid any commissions I was owed. Approximately two weeks after my termination, I went back to Prestige Ford to and spoke with Felix Gutierrez, the other Manager of the International Sales Division, and Bill Peace, the assistant to the president about my termination. I explained to them that Villareal had terminated me because my brother also worked there and that this was not right. Felix and Peace denied that Villareal terminated me for that reason.

After I was terminated from Prestige Ford, my brother Juan Garza told me to go to Skyline Ford and speak to Victor Cardenas, Sr., a Special Finance employee at Skyline Ford, about a job there. I then went to Skyline Ford and asked to speak with Mr. Cardenas. I was hired as a sales person and was paid on a 25% commission basis. I was employed by Skyline Ford from approximately May 1999 to September 1999. Skyline Ford was a much lower volume dealership (sold approximately 250-350 cars/month) than Prestige Ford (sold approximately 1000-1200 cars/month); therefore, I did not have the opportunity to sell as many cars at Skyline Ford as I would have at Prestige Ford. At the time of my employment, Prestige Ford was the number one dealership in Texas and Skyline was ranked near the bottom of the Ford Dealerships in Texas. I quit this job in September 1999 because I was treated in what I felt to be an abusive manner by Danny Fossi, one of my supervisors. For instance, Fossi screamed at me on more than one occasion in front of other coworkers to make a certain deals with my customers. On the final day, I had asked for a

certain car payment for one of my customers, and Fossi insisted that I get a different payment. When I told him again that the customer did not want his suggested payment, Fossi sent another sales person, Rick Chavez in, and allowed Chavez to approve the payment requested by the customer. Fossi would scream at me in front of other co-workers and customers in a condescending manner and tell me to be more aggressive. I also observed Fossi screaming at other employees while I was on the job. Because I am not an animal and I felt Fossi's screaming and treatment of me was inappropriate, I left this job.

In approximately December 1999, I attended a Prestige Ford Christmas party with my then boyfriend, Kenneth Blair, who worked for Prestige Ford at the time. At this party, I did not sit next to Villareal, but rather, I was seated at a table with my boyfriend and Villareal sat at a table next to my table. I attended this party out of respect for my then boyfriend.

In approximately late February 2000, I began working for Allstate Insurance Company for agent, Teresa Fuston. My job was to assist Fuston with her work in the office. I applied for the job with Fuston because my brother Juan Garza knew her from selling insurance policies to Prestige Ford customers. Just after I was hired by Fuston, Fuston called and asked me if I was suing Prestige Ford. I told her that I did not want to discuss it over the phone. Prior to my job with Fuston, I had filed a charge of sex discrimination with the EEOC as a result of my termination from Prestige Ford. When Fuston returned to the office, I told her that I did have a

sex discrimination case against Prestige Ford. Fuston and I then had a discussion about a call she had received from Juan Carlos Olvera, a sales person at Prestige Ford. I tape recorded this conversation. In this conversation, Fuston informed me that Juan Carlos called her and told her that I was a troublemaker and was suing Prestige and that Felix Gutierrez (manager at prestige Ford) told Juan Carlos to tell Fuston that she should fire me or they would stop doing business with her. Fuston told me that she was not going to fire me, but she told me to start using the name Sophia Guerra at work so that Prestige would not realize that it was me who was working for her. I then started using the name Sophia Guerra while I worked at Allstate for Fuston. Also, I was not placed on the company payroll and Fuston paid me with a personal check.

During my employment with Fuston, the majority of Fuston's business was from Prestige Ford, in particular referrals of Hispanic customers from Villareal and Gutierriez's International Division at Prestige Ford.

At no time during my employment with Fuston did I tell her that I wanted to buy a car dealership. It was Fuston who was planning to buy the car dealership and I would discuss this with her.

I was forced to quit my job at Allstate in April 2000 because of the harassment and humiliation I received from Fuston. Fuston did not train me and would leave me alone in the office. I asked for assistance and training but was not provided any. On my last day of work for Fuston, Fuston yelled and cursed at me for not providing insurance quotes to some potential customers. Fuston

screamed that I "f___ed it up" because I could not give the customer the quote and they left before she could return. I was not licensed to sell insurance or provide insurance quotes, but Fuston told me to give the quotes anyway and then yelled and cursed at me when I did not. Fuston's treatment of me was so harsh that it caused me to start crying and having difficulty breathing and caused my nose to bleed. I went to the bathroom and was spitting blood. Because I was physically ill and could not tolerate the treatment that I received from Fuston and the constant pressure of having to hide my employment with Fuston from Prestige Ford, I then locked the office and left. Fuston called me later that day, and I told her that I could not work there anymore. I went to Mexico for a few weeks to see a doctor. When I returned, I returned my key to Fuston and picked up my final check.

As a result of Prestige Ford's discriminatory treatment of me I experienced mental anguish. I have had trouble sleeping. I cannot seem to concentrate. When I think about what happened at Allstate and my termination from prestige Ford, I feel upset and get a headache. I feel like I cannot work to my full capacity because I have lost my confidence when I have to work with or approach people. I fear that I will be discriminated against again.

FURTHER AFFIANT SAYETH NOT.

/s/ Karla Garza
Karla Garza

SWORN TO AND SUBSCRIBED before me this 1st day of November, 2000.

[SEAL] MADONNA BRANCH
MY COMMISSION EXPIRES
August 20, 2001

/s/ Madonna Branch
Notary Public in and
for the State of Texas

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

KARLA GARZA, Plaintiff,	§	CIVIL ACTION
v.	§	NO. 3-00CV0400-H
PRESTIGE FORD GARLAND LIMITED PARTNERSHIP, Defendant.	§	

AFFIDAVIT OF CHARLIE NIXON

STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Charlie Nixon, who being by me duly sworn, on oath stated:

"My name is Charlie Nixon. I am over the age of eighteen (18) years, of sound mind, competent to testify, and have personal knowledge of the matters stated herein.

I am the General Manager of Defendant Prestige Ford. I have personal knowledge of the events surrounding Plaintiff Karla Garza's employment by and separation from Prestige Ford. Ms. Garza was hired by Prestige Ford on April 22, 1999, as a used car sales person. Ms. Garza had great difficulty performing many of the tasks

required by her job. In particular, she was unable to process the appropriate paper work and close sales transactions efficiently. As a result, Prestige Ford lost customers. When trying to sell a vehicle, Ms. Garza frequently had to seek the aid of other sales persons in processing the closing paper work. This became a problem since it took those sales persons away from other potential customers and caused problems regarding the splitting of commissions on sales. As a result of Ms. Garza's inexperience in car sales and her inability to perform the job for which she was hired, she was terminated as a sales person.

Prestige Ford employs many female sales persons. Prestige Ford did not terminate Plaintiff because she is a female. In fact, Prestige Ford offered to allow Ms. Garza to remain with the company if she would work with another, experienced sales person to learn how to approach customers, process the appropriate paper work, and close sale transactions. Ms. Garza did not accept the training position. Prestige Ford, however, secured a position for Ms. Garza at a competitor, Skyline Ford, because Prestige Ford believed that Skyline could offer Ms. Garza the type of formal training that she needed to be able to perform her job. At the time Prestige Ford terminated Ms. Garza, it did not have a formal training program available to used car sales persons.

During the time Ms. Garza worked at Prestige Ford and through March, 2000, Prestige Ford employed Juan Carlos Olvera. Mr. Olvera is the employee at Prestige Ford that spoke with Tresa Fuston regarding Ms. Garza's allegations against Prestige Ford. Prestige Ford did not authorize Mr. Olvera to speak with anyone regarding Ms.

Fuston's allegations against Prestige Ford. Mr. Olvera was employed as a sales person at Prestige Ford. He was not a manger [sic] or supervisor at Prestige Ford. At no time did Mr. Olvera have the authority to speak on behalf of Prestige Ford, hire employees, fire employees, or make any type of employment decisions that effected [sic] employees other than himself. Mr. Olvera never had the right or authority to control Ms. Garza's employment or make decisions regarding her employment status.

As General Manager of Prestige Ford, I have personal knowledge regarding the contents of employee personnel files, and I am a custodian of the personnel files. Attached as Exhibit "B" to Defendant's Motion for Summary Judgment, is a true and correct copy of the Employee Separation Report taken from Ms. Garza's personnel file. The attached Report is kept by Prestige Ford in the regular course of business, and it was in the regular course of business of Prestige Ford for a supervisor, such as Pablo Villarreal, with knowledge of the act, event, condition, fact, or opinion recorded to make the Report or to transmit information thereof to be included in such Report. The Report was made at or near the time Ms. Garza was discharged as a sales person, or reasonably soon thereafter. The attached Report is an exact duplicate of the original."

/s/ Charlie Nixon
Charlie Nixon, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this 29th day of September, 2000, to certify which witness my hand and official seal of office.

[SEAL] DEBRA L. GULLETT
Notary Public, State of Texas
My Commission Expires
March 02, 2003.

/s/ Debra L. Gullet
Notary Public, State of Texas

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KARLA GARZA,

Plaintiff

CIVIL ACTION NO.
3-00CV0400-H

VS.

PRESTIGE FORD
GARLAND LIMITED
PARTNERSHIP D/B/A
PRESTIGE FORD,

Defendant

ORAL DEPOSITION OF MR. CHARLES NIXON

OCTOBER 26, 2000

ANSWERS AND DEPOSITION OF MR. CHARLES NIXON, produced as a witness at the instance of the Plaintiff, taken in the above styled and numbered cause on the 26th day of October, 2000, before Karen A. Wilson, Certified Shorthand Reporter in and for the State of Texas, at the offices of Blume & Stoddard, 6116 N. Central Expressway, Suite 250, in the City of Dallas, County of Dallas, State of Texas pursuant to the agreement hereinafter set forth.

* * *

[5] Q. Did you participate in the decision to terminate Karla Garza's employment?

A. No, sir.

Q. How did you find out she'd been terminated?

A. I was told – well, I guess it was whenever we got the sex discrimination paperwork.

Q. The charge of discrimination?

A. Yes. From the State.

Q. All right. Is that the first knowledge that you had that Karla Garza was terminated?

A. As far as I remember.

Q. Before she was terminated did you know her?

A. No. I knew who – I mean, I knew who she was from being in the sales meetings on Saturday morning or being in a sales meeting on Saturday morning. They will introduce new salespeople at that time.

Q. Any other knowledge of her other than that?

A. No.

Q. Did you ever have an opportunity to observe her work?

A. Personally?

Q. Yes, sir.

A. No.

Q. Did you ever –

[6] A. Not that I recall.

Q. And when you say "personally," you mean you mean –

A. Did I physically see her doing something?

Q. Yeah.

A. Not that I recall.

Q. Did you ever hear her personally do anything?

A. Not that I recall. But I see 30, 40 salespeople a day doing various things for very short periods of time as I'm throughout the different departments, so.

Q. Did you ever hear any complaints about Karla Garza before she was terminated?

A. Not that I recall.

Q. Does your company have a progressive system of discipline?

A. I'm not sure I understand what your question is.

Q. Progressive discipline meaning, you know, if you have some dissatisfaction with an employee, you talk to them about it verbally and then if they don't improve, then you write them up and if they don't improve after the write-up, then you let them go?

[7] A. It depends on the situation. We empower our managers to make decisions to run their departments, so there's not a set termination policy, if that's what you're – if that's what you're asking.

Q. Okay.

A. Or conduct.

Q. Is there a company policy or procedure that provides or describes this type of disciplinary action?

A. This type?

Q. Yeah. Progressive discipline.

A. I don't believe so.

Q. Okay. I take it then before the charge of discrimination was received by your company you didn't have occasion to talk with Mr. Villarreal or Mr. Gutierrez about Karla Garza, true?

A. I don't believe I did.

Q. And before Karla Garza was terminated, did you ever speak to any of the managers of the used car department about her job performance or any complaints they had about it?

A. I don't recall speaking to them about it. Again, in a lot of these questions you're asking me I'm telling you I don't recall. I deal with 400 [8] employees.

Q. Right.

A. I deal with 100 plus of them every single day.

Q. Yeah.

A. So just –

Q. I mean, were you alarmed when you got the charge of discrimination?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. And I would take it then that since you were alarmed by having received a charge of discrimination, you would have searched your mind and your memory to see what you remember about this transaction.

A. Start asking questions.

Q. Sure. And when you start asking questions, I take it when you started asking questions you realized that you personally didn't know anything about what had happened, true?

MS. STODDARD: Object to the form of the question, but you can answer.

THE WITNESS: Other than what I learned.

* * *

[10] and see if I did make any notes. I don't know if I did or not. I attempt to write everything down, but it doesn't always happen.

Q. Have you ever made any effort before today to locate those notes?

A. No.

Q. But sitting here today did you personally know about anything that happened to Karla Garza before you got the charge of discrimination?

A. Not that I recall.

Q. Okay. Have you understood my questions, sir?

A. I believe so.

Q. If you haven't, you've certainly asked me to rephrase them I would hope, haven't you?

A. I believe I've understood your questions.

Q. Oh, by the way, I forgot. Do you know Teresa Fuston?

A. No.

Q. Never spoke to her? You don't even know who she is?

A. I know she's an Allstate agent.

Q. Okay. Can you tell us how much business your – or approximation your company would do with Teresa Fuston?

* * *

[13] Q. What about on used cars?

A. There's no – the minimum is $75.

Q. And still no max?

A. Right.

Q. What sort of training does your company provide its employees, new-hires?

A. Are you speaking specifically salespeople?

Q. Yes, sir.

A. Whenever – from time to time we'll put together a class. We've started in the last, I would say, six or eight months using a gentleman by the name of Mike Snell to do some structured training classes for us for new-hires.

Q. Okay. What was your training that was provided to new-hires back in 1999?

A. It was – our hiring classes were not as often or as frequent as they are now today.

Q. Uh-huh.

A. So I would say every three to five months we put an ad in the paper, hire a group of people, have a week's worth of training and go on.

Q. And you were doing that in 1999?

A. Yeah.

Q. Is that a yes?

A. Yes.

[14] Q. I'm not picking on you.

A. No. I understand. I understand.

Q. The court reporter has a hard time sometimes translating that. What is the percentage of commission that a salesperson would earn?

A. 30 percent.

Q. Of the net – of the net?

A. Of the gross –

Q. Of the gross sale?

A. – on the vehicle. Well, the profit.

Q. 30 percent of the profit. I see. And let's just say on the purchase price of a vehicle, would you add into that before you would deduct or ascertain your commission any factor for the floor plan?

A. No.

Q. What's the circumstances under which a person can get a referral fee, a salesperson can get a referral fee?

A. Salespeople don't – customers get referral fees.

Q. Salespersons don't get referral fees?

A. No.

Q. Okay.

MR. WALL: Thank you, sir. Pass the [15] witness.

MS. STODDARD: I have one question, Mr. Nixon.

CROSS EXAMINATION

BY MS. STODDARD:

Q. You just testified about in 1999 how you would provide training to new employees when you would do a group hire through the newspaper.

A. Right.

Q. Would you also do that if an individual person was hired at one particular time without a big group involved?

A. No.

Q. Okay. And then how would that be handled, training-wise?

A. On an individual basis with the manager and another salesperson. We'd team them up with somebody. We have senior salespeople at the store that if they average a certain number of units per month consistently and they have good customer satisfaction scores, then they're in senior sales. And if we get someone in the middle of one of our classes, we'll put them with those people, put them with one of those people.

Q. So if, for instance, someone's – an [16] employee's brother had recommended one of his family members to come to work and it wasn't during one of the group hires where you had formal training classes, this is how they would be trained?

A. Correct.

MS. STODDARD: We'll reserve the rest of our questions till time of trial.

REDIRECT EXAMINATION

BY MR. WALL:

Q. That's the way it would have been in 1999?

A. Yes, sir.

MR. WALL: Okay. Thank you, sir.

THE WITNESS: You're welcome.

* * *

[18] CERTIFICATE

I, Karen A. Wilson, Certified Shorthand Reporter in and for the State of Texas do hereby certify that the facts as stated by me in the caption hereto are true; that there came before me the aforementioned named person, who was by me duly sworn to testify the truth concerning the matters in controversy in this cause; and that the examination was reduced to writing by computer transcription under my supervision; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to

the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action.

Given under my hand and seal of office on this the 31st day of October, A.D., 2000.

/s/ Karen A. Wilson
KAREN A. WILSON,
CSR No. 2328,
12/31/01, 3308 Preston Road,
#350-166, Plano, Texas 75093

Taxable cost: $_____